

CERTIFIED FOR PARTIAL PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN MARKEL SNOW,

Defendant and Appellant.

D035655

(Super. Ct. No. SCD141908)

ORDER MODIFYING OPINION
AND DENYING REHEARING

NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on January 14, 2003, be modified as follows:

1. On page 1, footnote 1, the words "part II" are changed to "parts II and IV."
2. On page 22, following the end of part III and immediately before the Disposition, part IV is added as follows:

"IV

CONSTITUTIONAL CHALLENGE TO THE SENTENCE

Snow contends that his prison term sentence violates the cruel and unusual punishment prohibitions of the Eighth Amendment to the United States Constitution and

article I, section 17 of the California Constitution, and the equal protection provisions of the Fourteenth Amendment to the United States Constitution and article I, section 7 of the California Constitution. Snow's cruel and unusual punishment argument focuses on the disproportionality of a posited 150-year-to-life sentence to the crime of which he was convicted. The sentence, however, is 85 years to life. Nevertheless, for purposes of disproportionality we see little difference between the posited and actual sentences.

"A punishment may violate article I, section 17 of the California Constitution if 'it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity.' (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) A punishment is excessive under the Eighth Amendment to the United States Constitution if it involves the 'unnecessary and wanton infliction of pain' or if it is 'grossly out of proportion to the severity of the crime.' (*Gregg v. Georgia* (1976) 428 U.S. 153, 173.) In determining whether a particular punishment is cruel and/or unusual, courts examine the nature of the particular offense and offender, the penalty imposed in the same jurisdiction for other offenses, and the punishment imposed in other jurisdictions for the same offense. (*In re Lynch, supra*, 8 Cal.3d at pp. 425-427.)

"Snow does not demonstrate either intrastate or interstate disproportionality, but rather emphasizes the length of sentence for the crime shocks the conscience and offends the sense of human dignity. Application of all of the relevant considerations convinces us that Snow has not shown his sentence is so disproportionate to his crimes that it shocks the conscience or offends fundamental notions of human dignity. (*People v. Dillon* (1983) 34 Cal.3d 441, 477-478; *In re Lynch, supra*, 8 Cal.3d at pp. 423-424; *People v.*

Crooks (1997) 55 Cal.App.4th 797, 803-809. Until the California Supreme Court or United States Supreme Court considers the cruel and unusual aspects of the Three Strikes law, we are constrained to follow the precedent of existing Court of Appeal decisions.

"Snow's equal protection challenge focuses on his argument that dual use of the same prior conviction to trigger the habitual sex offender statute (§ 677.7) and the One Strike law (§ 667.61) results in his 'receiving a disparate, harsher, and more unfair treatment from those similarly situated violent recidivists who are protected by case law from having enhancements for qualifying priors imposed no more than once.' However, the predicate for Snow's equal protection argument is not present. We hold in this opinion that the One Strike law and habitual sex offender statute are mutually exclusive sentencing schemes. We have dismissed the habitual sex offender conviction and there is therefore no dual use of the same prior conviction under those two schemes."

There is no change in the judgment.

The petition for rehearing is denied.

BENKE, Acting P. J.

Copies to: All parties